law: See Yelv. 41 b (Metcalf's ed.); 1 Pars. on Cont. 434, 435; Met. on Cont. 178, 181; Chitty on Cont. (11 Am. ed.) 52, 55; 2 Bl. Com. (Cooley's ed.) 445, note 6; 1 Story on Cont. (4th ed.) sect. 465; 1 Bish. Mar. Wom. sect. 39; *Loyd* v. *Lee*, 1 Stra. 94; *Meyer* v. *Haworth*, 8 Ad. & El. 467; *Maher* v. *Martin*, 43 Ind. 314; *Thompson* v. *Warren*, 8 B. Mon. 488; *Waters* v. *Bean*, 15 Ga. 360; *Foster* v. *Wilcox*, 10 R. I. 444; *Hetherington* v. *Hixon*, 46 Ala. 298; *Watson* v. *Dunlap*, 2 Cranch C. C. 14; *Viser* v. *Bertrand*, 14 Ark. 274; *Littlefield* v. *Shee*, 2 B. & Ad. 813, per Lord TENTERDEN, C. J.; *Monkman* v. *Shepherdson*, 11 A. & E. 415; *Beaumont* v. *Reeve*, 8 Q. B. 486, 487; *Eastwood* v. *Kenyon*, 11 A. & E. 447; *Jennings* v. *Brown*, 9 M. & W. 501, per PARKE, B.; *Cook* v. *Bradley*, 7 Conn. 57; *Mills* v. *Wyman*, 3 Pick. 207; *Edwards* v. *Davis*, 16 Johns. 283, note; *Smith* v. *Ware*, 13 Johns. 259; *McPherson* v. *Rees*, 2 P. & W. 521; *Dodge* v. *Adams*, 19 Pick. 429; *Loomis* v. *Newhall*, 15 Id. 159; *Parker* v. *Carter*, 4 Munf. 273; *Hawley* v. *Farrar*, 1 Vt. 420; *Farnham* v. *O'Brien*, 22 Me. 475; *Warren* v. *Whitney*, 24 Id. 561; *Snevily* v. *Read*, 9 Watts 396; *Ehle* v. *Judson*, 24 Wend. 97; *Geer* v. *Archer*, 2 Barb. 420; *Shepard* v. *Rhodes*, 7 R. I. 472; *Nash* v. *Russell*, 5 Barb. 556; *Watkins* v. *Halstead*, 2 Sandf. 311; s. c. Ewell's Lead. Cas. 317.

In many of the states, the question involved in the principal case has been solved by statutes enabling married women to contract as *femes sole*. But in those states where the common law prevails upon this subject, the principal case will be read with interest, and will form an important addition to the existing authority upon this interesting question.

MARSHALL D. EWELL.

Chicago.

Supreme Court of Colorado.

DOUGAN ET AL. *v.* THE DISTRICT COURT OF LAKE COUNTY.

Where a statute authorizes an administrative or ministerial body (as the council of a city) to appoint an officer to hold during its pleasure, such body can remove in its discretion, and the exercise of such discretion cannot be controlled or restrained by the courts.

The writ of prohibition lies only to an inferior judicial tribunal, and not to bodies exercising ministerial and administrative powers only.

Where a city council is proceeding to investigate charges, with the view of removing an officer appointed to hold during the pleasure of such council, an order of court staying proceedings and to show cause why a writ of prohibition should not issue is made without jurisdiction, and is absolutely void; and a disregard of such an order is not a contempt of court.

But to justify a disregard of an order of court it should appear upon the face of the pleading, upon which it was made, that the court making the same had no jurisdiction.

Where a court is proceeding to punish the disregard of an illegal order, as for a contempt, it is a proper case for preventive relief by prohibition.

THE facts of the case sufficiently appear in the opinion of the court.

H. B. Johnson, Daniel E. Parks, A. W. Rucker and *D. J. Haynes*, for petitioners.

L. C. Rockwell, J. L. Murphey, L. M. Goddard and *Thomas George*, for respondent.

HELM, J.—No argument is necessary to show that if the petitioners are entitled to any relief in this cause, prohibition is the proper proceeding therefor. The court below has taken jurisdiction of the contempt case; it has tried petitioners and adjudged them guilty of contempt; it has deferred sentence, but threatens to pronounce the same. There is no final judgment subject to review in this court by appeal, by writ of error, or by *certiorari*. No imprisonment has followed a sentence pronounced, and relief by *habeas corpus* cannot be invoked. Yet imprisonment may be a part of the sentence, and before aid could be given by this court after judgment, petitioners might be deprived of their liberty, and undergo several days' confinement. A stronger case for this preventive relief, if the District Court or judge is assuming a jurisdiction without legal right thereto, it might be difficult to find.

The city council of Leadville had preferred charges against the city solicitor, and were proceeding to consider the same. They were acting in the manner provided by ordinance, and the ordinance was passed in accordance with law. The solicitor was elected or appointed by the council, and held his office subject to removal by them for certain causes; among these causes are the ones specified in the charges preferred in the case before them, viz.: malfeasance and incompetency in office. The record, including the petition presented to the district judge, does not justify the conclusion that the council were assuming to act as a court and try the solicitor for the purpose of inflicting upon him, if found guilty, any other punishment than reprimand, suspension, or removal from office. The district judge, upon petition, granted an order commanding the members of the city council to show cause why a writ of prohibition should not issue, and directing that further proceedings by them be stayed until the hearing thereof.

The first question we deem it important to notice is that of jurisdiction in the court or judge to make the order above mentioned to show cause, and to stay proceedings. The object of the writ of prohibition is to restrain subordinate judicial tribunals from exceed-

ing their jurisdiction: High Ex. Legal Rems., sects. 762, 784. "It is used to confine inferior courts in the exercise of their powers, within the limits fixed by law:" *Leonard* v. *Bartels et al.*, 4 Col. 95. It will be observed that the tribunal to which the writ issues must be acting in a judicial, and not merely an administrative or ministerial capacity. See High Ex. Legal Rems. sect., 769; *Home Ins. Co.* v. *Flint*, 13 Minn. 244, and cases there cited.

The city council is not a judicial body, and it is doubtful if the legislature, under the Constitution, could invest it with judicial authority. In the case under consideration it was not acting or attempting to act in a judicial capacity. The examination of charges preferred against the city solicitor, finding him guilty of malfeasance in office, and removing him therefrom, by the city council, was not the exercise of judicial power. And this is true though the offences charged may constitute causes of action cognisable by the courts. See *Donahue* v. *County of Will et al.*, 100 Ill. 94.

The power of suspending or removing the solicitor was by statute and ordinance vested in the city council, and investigation into his official conduct with a view to suspension or removal, was a proceeding entirely within their discretion and control. We think the District Court had no jurisdiction to control the action of the city council, and that this fact appeared sufficiently upon the face of the petition presented to it; and it follows that its order directing the council to desist from further proceedings was absolutely void. Was the disobedience of such order by the council a contempt for which they could be arrested and punished? Upon this question there is some conflict of authority. A few cases are cited by counsel which seem to hold that disobedience of the process of a court is contempt, even though the want of jurisdiction appears on the face of the pleadings. See *Passmore Williamson's Case*, 26 Penn. St. 20; *Ex parte Stickney*, 40 Ala. 160; *State of Louisiana, ex rel. Follett et al.*, v. *Righter, Judge*, 32 La. Ann. 1182. But we believe that the weight of authority is against this position. The later and better doctrine seems to be that if the court has no jurisdiction of the action, and such fact affirmatively appears in the original petition or complaint, the process issued therein is absolutely void; and that disobedience of such void process, or orders made in connection therewith, is no contempt. The power of punishing for contempt is inherent in all

courts. It is absolutely necessary that they should possess it, whether expressly given by statute or not; and when the court has jurisdiction of the class of cases to which the action belongs, unless a want of jurisdiction in this particular case affirmatively appears on the face of the complaint or petition, no error in rulings, no irregularities in the proceedings, will divest it of this power. We use the word "class" with reference to the subject-matter, and not the form of action.

It will be observed from the foregoing that we do not take the broad ground that there is no power to punish any disobedience of orders of the court or judge, in all cases where it turns out during the proceedings, or at the conclusion thereof, that the action must be dismissed for want of jurisdiction. Sometimes days of patient investigation are consumed before the want of jurisdiction becomes apparent; during such investigation witnesses must appear and testify, and all interlocutory orders essential to the proper conducting thereof, must be obeyed. See generally on this subject the following additional authorities: *Ex parte Rowe*, 7 Cal. 181; *Dickey* v. *Reed*, 78 Ill. 261; *Coughlin* v. *Ehlert*, 39 Mo. 285; *Batchelder* v. *Moore*, 42 Cal. 412, 42; *Perry* v. *Mitchell*, 5 Denio 540; *Brennan* v. *Gaston*, 17 Cal. 375; *Walton et al.* v. *Develling et al.*, 61 Ill. 206.

We have made no effort to consider in this opinion all of the questions presented by counsel; neither have we attempted to discuss fully or exhaustively those touched upon herein. Sufficient has been said, however, to indicate that in our judgment this is a proper case for granting the relief prayed for.

Let the writ of prohibition issue accordingly.

We propose to briefly review two of the most important principles of law involved in and determined by the above reported decision.

I. The officer was appointed to hold during the pleasure of the council: Gen. Stat. 912, sect. 79. In such a case no court has power to prohibit or review the exercise of such pleasure. In the case of *People* v. *Stout*, 19 How. Pr. 171, and in the case of *Walton* v. *Develing*, 61 Ill. 201, this principle and the reasons upon which it stands, were clearly and fully enunciated. If the law gives a discretion the implication is that the person must act without other control than his own judgment. A discretion that can be controlled is no discretion. If the law declares that a certain person or body shall perform a certain act at discretion, and a court orders that the act shall not be done, or shall only be done in a certain way, or under certain circumstances, there arises an irreconcilable conflict between the statute and the order of the court. If the statute is constitutional and valid the order of court must be void. And

for the same reasons, where the act has been performed, there is no power in the courts to review the same: *Wertheimer* v. *Mayor, &c.*, 29 Mo. 254; *State* v. *Doherty*, 13 Amer. Rep. 131; *People* v. *Metzker*, 47 Cal. 524; *Keenan* v. *Perry*, 24 Texas 253; *Frewin* v. *Lewis*, 4 Myl. & C. 249.

II. In this case the subject-matter was the removal of the city solicitor of Leadville by the city council in pursuance of law, and in accordance with the ordinances of the city passed in accordance with law: *Borst* v. *Corey*, 15 N. Y. 505; *People* v. *Sturtevant*, 9 N. Y. 263; 2 Abbott's Law Dict. 510; 2 Bouvier's Law Dict. 551.

It has been held that where an order was merely erroneous (20 Am. L. Reg. 145), or of doubtful scope and validity (15 Central Law Jour. 42; *Weeks* v. *Smith*, 3 Abb. Pr. 211; *Kennedy* v. *Weed*, 10 Id. 62; *State* v. *Wheeling, &c.*, 18 How. 421), a contempt for acting against it would not be discharged. But here, the judge and court being without jurisdiction over the subject-matter, the order was unlawful and void, and the disregard of the same was no contempt: Civil Code, sect. 35; *Ex parte Rowe*, 7 Cal. 181; *People* v. *O'Niel*, 47 Id. 109; *Ex parte Grace*, 12 Iowa 208; *Walton* v. *Develing*, 61 Ill. 201; *Dickey* v. *Reed*, 78 Id. 261; *State* v. *Wilcox*, 24 Minn. 143; *State* v. *Civil District Court*, 13 Rep. 780; 15 Cent. L. Jour. 42; *Piper* v. *Pearson*, 2 Gray 120; *Perry* v. *Mitchell*, 5 Denio 537; *Ex parte Hayne*, 4 C. L. J. 72; *In re Morton*, 10 Mich. 208; *Coughlin* v. *Ehlert*, 39 Mo. 285; *Holman* v. *Austin*, 34 Texas 668; *Batchelder* v. *Moore*, 42 Cal. 412.

In *Walton* v. *Develing*, 61 Ill. 201, the court, in discussing the question as to whether an illegal order or process of a court should be obeyed, said: "The process must be issued in compliance with the law. Its vitality depends upon this. If the act enjoined is plainly and imperatively required by law to be performed by the officer, then the process forbidding it is not made conformably to law. In this case, the power to punish for contempt is only auxiliary and incidental to jurisdiction over the subject-matter. As there was no jurisdiction of the matters alleged in the bill, the subsequent action of the court was extra-judicial and void. There could, therefore, be no contempt, as there was no jurisdiction in this case."

The principle so clearly and forcibly stated in the above quotation is fully recognised in all of the above-cited cases, and needs no further comment.

H. B. JOHNSON.

Supreme Court of Pennsylvania.

DARRAH ET AL. *v.* BAIRD.

Fixtures annexed by a tenant are not goods and chattels for all purposes. They are not chattels unless made so by the tenant's severance, or for the benefit of his execution creditors. While they remain attached, they are part of the freehold.

Trover does not lie for fixtures attached by a tenant, and remaining annexed to the freehold, against the owner of the land, who has taken possession of the premises.

The fact of an agreement between landlord and tenant that the latter may remove fixtures at the end of his term, does not either permit him to do so thereafter, nor enable him to maintain trover against the owner of the premises in case of his refusal to permit their removal.